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No. 05-83

IN THE

Supreme Court of the United States

STATE OF WASHINGTON,
Petitioner,

v.

ARTURO R. RECUENCO,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
A. Factual Error	1
B. Citation Error	2
C. The Washington Supreme Court's Decision Forecloses Harmless Error Analysis For Sentencing Error That is Less Egregious than the Constitutional Error in Apprendi and Blakely	3
D. Review of Error Under Mandatory Determinate Sentencing Schemes Will Be Seriously Impacted by the Decisions of the Washington and North Carolina Supreme Courts	4
E. Respondent Incorrectly Asserts that the State's Argument Requires a Decision on Whether "Sentencing Enhancements" are Constitutionally Equivalent to "Elements" of a Crime	5
F. Respondent's Double Jeopardy Arguments Were Not Properly Raised in State Court, and Were Never Addressed by the Washington Supreme Court	6
CONCLUSION	7

TABLE OF AUTHORITIES

CASES Page

Apprendi v. New Jersey, 530 U.S. 466 (2000) 3
Blakely v. Washington, 542 U.S. 296 (2004)..... 3
Neder v. United States, 527 U.S. 1 (1999) 4
Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) .. 7
State v. Gocken, 127 Wash.2d 95, 101, 896 P.2d 1267 (1995)..... 6
State v. Hughes, 154 Wash.2d 118, 110 P.3d 192 (2005)..... 4
State v. Speight, ___ N.C. ___, 614 S.E.2d 262 (2005)..... 9
Sullivan v. Louisiana, 508 U.S. 275 (1993)..... 4
Yee v. Escondido, 503 U.S. 519, 533 (1992)..... 6

STATUTES

Wash. Rev. Code § 9.94A.533 3
Wash. Rev. Code § 9.94A.345 3
Former Wash. Rev. Code § 9.94A.510 (1999)..... 3

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REPLY TO BRIEF IN OPPOSITION

Petitioner, State of Washington, files this reply to point out six flaws in Recuenco's Brief in Opposition (hereinafter BIO). The points relate to the following: a factual error, a mistaken claim regarding Petitioner's citation to a Washington statute, a mistaken characterization of the "error" that was committed in this case, a mischaracterization as to the impact of the Washington Court's decision, a mischaracterization of the State's arguments, and a clarification that certain Double Jeopardy arguments are not properly before this Court. The arguments in reply are set forth below.

A. Factual Error

In apparent attempt to suggest that harmless error analysis would not assist the State in this case, Recuenco obscures an important factual matter. He says that Petitioner "incorrectly asserts [t]here was no evidence of any other weapon *in the*

assault." BIO at 2 (italics added—citing Petition at 2). He then says that "the evidence established that during the course of the *incident* Mr. Recuenco wielded a metal pipe." BIO at 2 (italics added). He cites a Washington statute providing that a deadly weapon can be defined as "any metal pipe or bar used or intended to be used as a club" and thereby implies that a pipe, not the gun, might have served as a basis for the jury's deadly weapon finding on the assault charge.

The difference between the words *assault* and *incident* are significant in this context. Recuenco indeed smashed a stovetop with a pipe during this *incident*, and he was charged with and convicted of malicious mischief for that conduct. See Petition at 10a-11a. But it has always been clear that whereas the pipe was the instrument of the malicious mischief charge, a gun was alleged to have been used in regard to the *assault charge*. *Id.* at 10a -17a. Nobody argued, alleged, or suggested that the pipe was used as an instrument to assault the victim. In fact, the charging document referred to a handgun being used in the assault, the jury instructions defined deadly weapon in terms of a firearm, the arguments of both lawyers to the trial judge focused on Recuenco's possession of the gun, and the arguments of both lawyers to the jury focused on his use or possession of a gun. Petition at 3a-4a, 10a-11a. Likewise, the appellate challenge to the assault conviction has always focused on Recuenco's use of a gun. *Id.* at 9a-19a.

Thus, it is misleading for Recuenco to suggest that smashing the stove with a pipe had anything whatsoever to do with the deadly weapon special verdict on the assault charge, or that the pipe in any manner affects the legal issue presented in the State's Petition for Writ of Certiorari.

B. Citation Error

Recuenco claims that the State erroneously cited to Wash. Rev. Code § 9.94A.510 in its petition. He claims that the correct statutory citation is to Wash. Rev. Code

§ 9.94A.533. See BIO at 2. Recuenco is mistaken. His crime was committed on September 18, 1999. The statute he cites was not enacted until the year 2002. See Wash. Rev. Code § 9.94A.533 (Historical and Statutory Notes). Under Washington law, the sentencing statute in effect on the date the crime was committed is the statute that controls sentencing. Wash. Rev. Code § 9.94A.345. Thus, Former Wash. Rev. Code § 9.94A.510 (1999) is the statute that applies to his sentencing. The State's citation was incomplete in that it omitted the term "former" and did not include a designated year, but the citation is otherwise correct.

C. The Washington Supreme Court's Decision Forecloses Harmless Error Analysis For Sentencing Error That is Less Egregious than the Constitutional Error in Apprendi and Blakely.

Recuenco claims that this case is a poor vehicle for analyzing harmless error because it involves more egregious error than occurred in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), or *Blakely v. Washington*, 542 U.S. 296 (2004), insofar as the trial judge "enter[ed] a judgment notwithstanding the verdict." BIO at 5-6. This argument is meritless. The trial court here imposed a "firearm" sentence because the evidence unequivocally established that the "deadly weapon" used by Recuenco was a firearm, and Washington law requires a longer sentence for use of a firearm. The trial court essentially imposed judgment on the verdict it believed had been rendered, finding that the failure of the verdict form to expressly mention the term "firearm" did not change the fact that the verdict encompassed the firearm finding. In *Apprendi* and *Blakely*, however, a greater sentence was imposed based on *disputed* findings of fact made by the judge—facts that had never been submitted to a jury in any form. Thus, contrary to Recuenco's claims, the "error" in this case is arguably *less* egregious than the error that occurred in *Apprendi* or *Blakely*.

In any event, the central question presented here is whether sentencing enhancement error is subject to harmless error analysis at all, and whether the instructional error made in this case is more akin to a missing element as in *Neder v. United States*, 527 U.S. 1 (1999), or to the structural error described in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). The State argues that this situation is indistinguishable from *Neder*-type error, where the appellate court made a finding on an element that went beyond the jury's express verdict, but where that finding was unquestionably supported by the evidence.

D. Review of Error Under Mandatory Determinate Sentencing Schemes Will Be seriously Impacted by the Decisions of the Washington and North Carolina Supreme Courts.

Recuenco argues that the question presented impacts only a few cases. He is mistaken. He is correct that the impact on federal cases will be minimal, in part because no Federal appellate court has misinterpreted this Court's precedent as the Washington Supreme Court and the North Carolina Supreme Court have done, *see State v. Hughes*, 154 Wash.2d 118, 110 P.3d 192 (2005), and *State v. Speight*, ___ N.C. ___, 614 S.E.2d 262 (2005), and in part because the federal guidelines are now advisory. Yet, there is considerable confusion in the State courts regarding the constitutional parameters of the harmless error doctrine and the Sixth Amendment. Petition at 14-15.

More importantly, however, Recuenco erroneously suggests that the impact of the Washington Court's decision will decrease over time. It is important to recall, first, that Washington law required the "weapon" question to be decided by a jury, and the question *was* submitted to a jury in this case. The trial court "erred" however, only insofar as it failed to ensure that the jury verdict *expressly* included the firearm finding. Errors like this can occur in *any* sentencing

hearing where the aggravating factor is submitted to a jury. And, contrary to Recuenco's argument, BIO at 8, recent changes to Washington's sentencing laws, requiring nearly all aggravating factors to be decided by a jury, will expand rather than limit the impact of the *Recuenco* decision. See BIO at 8-9 (citing Ch. 68 Laws of Washington 2005, §§ 1-7 amending Wash. Rev. Code §§ 9.94A.530 and .535). Now, any error in finding an aggravating sentencing factor will be per se reversible, meaning this misinterpretation of the federal constitution will have a continuing and broad impact on sentencing in State courts with similar sentencing schemes. Review by this Court is required to correct this misinterpretation of Supreme Court precedent, and to alleviate the confusion in the State courts. See Petition at 7-10, 14-16.

E. Respondent Incorrectly Asserts that the State's Argument Requires a Decision on Whether "Sentencing Enhancements" are Constitutionally Equivalent to "Elements" of a Crime.

Recuenco incorrectly asserts that "[t]he State's argument is premised on the incorrect assertion that neither the deadly weapon nor firearm findings are elements of an offense." BIO at 10-11. The State's argument is not, however, premised on the difference between elements and sentencing enhancements. In fact, whether sentencing enhancements are distinct from elements need not be decided in this case. All this Court needs to hold is that an error in defining a sentencing enhancement will not be held to a higher standard of appellate review than the standard applied to review of missing elements. As stated in the petition, "it would be incongruous to permit harmless error analysis as to a missing element, but to prohibit such analysis as to a misdefined sentencing factor." Petition at 10.

F. Respondent's Double Jeopardy Arguments Were Not Properly Raised in State Court, and Were Never Addressed by the Washington Supreme Court.

Finally, Recuenco's brief in opposition incorrectly suggests that this case presents issues under the Double Jeopardy Clause of the Federal Constitution. It does not. Recuenco belatedly raised such issues in the Washington Supreme Court, the State moved to strike the arguments because they had never been made in the trial court or in the Court of Appeals. The Washington Supreme Court ultimately declined to reach the issue because it reversed Recuenco's sentence. Petition at 8a n. 3. Thus, there is no State Court decision on the double jeopardy issue, and the issue was not properly preserved in any event. It should not be considered by this Court. *Yee v. Escondido,* 503 U.S. 519, 533 (1992) (declining to review issue not properly presented to State court and not decided by State court).

Moreover, his arguments are plainly without merit. The Double Jeopardy clause of the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. 5. The clause has been construed to encompass three separate constitutional protections: It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense. *State v. Gocken,* 127 Wash.2d 95, 101, 896 P.2d 1267 (1995). Recuenco's case does not fall into *any* of the three double jeopardy categories: he has not been acquitted of any charge, so there is no prosecution after acquittal; he has only been prosecuted once, so he has not been subject to a second prosecution for the same offense after conviction; and he has not suffered multiple punishments for the same offense. For these reasons, the Double Jeopardy clause is simply inapposite.

Reliance on *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003) is also misplaced. *Sattazahn* involved a death sentence imposed in a second trial where the jury in the first trial had deadlocked on the death penalty. This Court held that the State could pursue a death sentence even though such sentence had not been imposed in the original proceeding. The analysis turned on whether the first jury's deadlock was an acquittal on the death penalty. This Court held it was not and, thus, Double Jeopardy did not bar a second trial on the issue. 537 U.S. at 113. There is, however, no second trial, and no acquittal, at issue in Recuenco's case, so *Sattazahn* does not control this case.

CONCLUSION

For these reasons, Petitioner respectfully submits that this case is an excellent vehicle for clearing the confusion that exists, especially in the State courts, regarding whether harmless error analysis may be conducted when a trial court has found a fact that should have been expressly found by a jury.

Respectfully submitted,

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